



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

KC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Matthias Schuster, UNICEF

Chinonyelum Esther Uwazie, UNICEF

Introduction

1. By application filed on 24 April 2020, the Applicant, a former staff member with the United Nations Children’s Fund (“UNICEF”), Nepal Country Office, contested the disciplinary measure of separation from service, with termination indemnity and compensation in lieu of notice, imposed on him on 31 January 2020.
2. On 22 May 2020, the Respondent filed his reply.
3. On 26 August 2021, the present case was assigned to the undersigned Judge.
4. By Order No. 144 (GVA/2021) of 20 September 2021, the Tribunal convoked the parties to a case management discussion (“CMD”), which took place on 24 September 2021. During the CMD, the Tribunal instructed, *inter alia*, the parties to file their closing submissions by 8 October 2021.
5. On 5 October 2021, the Applicant filed his closing submission with 16 annexes. On 8 October 2021, the Respondent filed his closing submission with 8 annexes and a motion to upload supporting documents, some of which were requested by the Tribunal during the CMD. For the fair and expeditious disposal of the case, the Tribunal granted the motion pursuant to art. 19 of its Rules of Procedure.

Facts

6. On 15 August 2013, the Applicant began his service with UNICEF as a Health Specialist at the National Officer-C level.
7. The Applicant was the Programme Manager and Certifying Officer of the Programme Cooperation Agreements (“PCA”) that UNICEF entered into in 2015 with Lifeline Nepal. UNICEF disbursed approximately USD1,570,833.00 to Lifeline Nepal under the PCA. In September 2016, Lifeline Nepal hired the Applicant’s spouse as a Consultant to support a UNICEF-sponsored programme. Between 2016 to 2017, she was paid approximately USD21,000.

8. The Applicant was also the Programme Manager of the PCA that UNICEF entered into in February 2017 with Golden Community. He certified the forms submitted by Golden Community. Prior to this agreement, in August 2016, UNICEF entered into a Small-Scale Funding Arrangement with Golden Community. UNICEF paid it approximately USD228,789 under the Small-Scale Funding Arrangement and PCA. The Applicant's spouse and father-in-law were Board Members of Golden Community. The Applicant's father-in-law also was the Managing Director of Golden Community. As Programme Manager and Certifying Officer, the Applicant engaged professionally with his spouse and his father-in-law who represented Golden Community.

9. With respect to the payment to the Applicant of a spouse dependency allowance, the Applicant's spouse earned NPR1,961,740 between 2016 and 2017. Further, she earned NPR40,750 from 16 December 2016 to 15 January 2017. From 1 December 2017 to 15 October 2018, she earned NPR982,800. These earnings were in excess of the prescribed salary threshold for receipt of a spouse dependency allowance.

10. On 9 October 2018, the UNICEF Office of Internal Audit and Investigations ("OIAI") received a report of possible misconduct implicating the Applicant. It was alleged that the Applicant did not disclose his spouse's involvement as a Consultant for Lifeline Nepal, a UNICEF implementing partner, as well as his spouse's and his father-in-law's involvement with Golden Community, also a UNICEF implementing partner.

11. On 10 October 2018, OIAI notified the Applicant that it was investigating the allegations. During the investigation, OIAI found, *inter alia*, that the Applicant had been in receipt of a spouse dependency allowance when, in fact, his spouse's earnings exceeded the threshold for payment of spouse dependency allowance.

12. On 11 October 2018, the Applicant was placed on Administrative Leave with Full Pay until 31 January 2019. On 30 November 2018, this was changed to Administrative Leave Without Pay until 31 January 2019, which was extended until 31 December 2019.

13. On 15 October 2018, the Applicant responded to the allegations.
14. On 30 November 2018, the Applicant was interviewed by OIAI. Following the receipt of a copy of the interview transcript, he was provided two weeks to present any additional information he deemed appropriate in relation to the matter under investigation. He did so on 12 December 2018.
15. By Memorandum dated 16 December 2019, OIAI transmitted Investigation Report No. 2018/0147 to the Director, Division of Human Resources (“DHR”) at UNICEF for appropriate action.
16. By Charge Letter dated 15 January 2020, the Director, DHR, charged the Applicant with misconduct with respect to, *inter alia*, allegations that he did not disclose a conflict of interest regarding his wife and father-in-law’s involvement with implementing partners, and that he claimed spouse allowance whilst his spouse earned more than the stipulated salary threshold.
17. On 27 January 2020, the Applicant submitted his response to the charge letter, with supporting documentation.
18. On 31 January 2020, the Deputy Executive Director (“DED”), Management, imposed on the Applicant the disciplinary sanction of separation from service, with termination indemnity and compensation in lieu of notice for misconduct. The DED further directed the Global Shared Services Centre (“GSSC”) to recover the dependency allowance he received in 2016-2018, an amount equivalent to NPR29,420.
19. On 31 January 2020, the Applicant was separated from service.

Parties’ submissions

20. The Applicant’s principal contentions are:
 - a. The total employment gains of the Applicant’s spouse did not exceed the total salary gain of General Service (GS) staff during the period from 2013 to 2018. He agreed to reimburse the dependency allowance if DHR found it

justifiable; during the CMD and in his closing submission, the Applicant contended that he never claimed a spouse allowance;

b. The only issue was the Applicant's failure to properly comply with the obligations to disclose a probable conflict of interest:

i. However, it was a *bona fide* act of omission and he expressed profound regret in having done so. He had not completed the mandatory course on Ethics and Fraud awareness. Had he taken such training, he would have declared the conflict of interest;

ii. His father-in-law did not gain any financial benefit from the partnership agreement; and

iii. He disclosed the potential conflict of interest at the early stage of the investigation;

c. The disciplinary sanction imposed on the Applicant is not proportionate to the nature and gravity of his misconduct and is much more excessive than was necessary:

i. The DED's discretion was not exercised properly;

ii. A lesser sanction or even an administrative reprimand would have been appropriate and proportionate considering the mitigating circumstances identified;

iii. By imposing a sanction of separation from service, the DED failed to comply with the principle of equality and the principle of consistency with other similar cases that must be followed to protect his due process right;

d. There are procedural flaws in the investigation proceedings:

i. The Administration was in breach of duty to perform an independent investigation by utilizing professionals within the UNICEF Country Office in Nepal;

ii. The Administration was in breach of duty to protect confidentiality; and

iii. The investigation was protracted for a period of 16 months.

21. The Respondent's principal contentions are:

a. There is clear and convincing evidence that the Applicant engaged in the conduct for which he was sanctioned:

i. The Applicant did not disclose his spouse's and his father-in-law's involvement with two UNICEF implementing partners, of which the Applicant was the responsible Programme Manager on behalf of UNICEF;

ii. He failed to inform UNICEF that his spouse's earnings exceeded the relevant income threshold, resulting in his receipt of dependency allowance for 2016, 2017 and 2018, to which he was not entitled;

iii. At the CMD and in his closing submission, he denied for the first time that he claimed dependency allowance, which is inconsistent with his earlier statements made during the investigation and disciplinary proceedings; and

iv. In any event, he had access to his Personal Career Profile and monthly pay slips, which showed that he received an allowance on account of his spouse being his dependent;

b. The Applicant's actions amounted to misconduct in violation of the UN Staff Regulations and Rules, warranting the disciplinary measure imposed:

i. The Applicant's failure to disclose his spouse's and father-in-law's involvement with the implementing partners that he managed displays an inherent lack in integrity and constituted a conflict of interest;

ii. His failure to inform UNICEF of his spouse's income, benefiting from an allowance to which he was not entitled, also displays a serious lack of integrity and loyalty to UNICEF;

c. The sanction imposed on the Applicant, namely separation from service, with compensation in lieu of notice and termination indemnity, was not arbitrary or disproportionate:

i. The imposed disciplinary measure fell within the Administration's discretion;

ii. The staff members' actions in the cases referenced by the Applicant, two of which were in relation to outside activities normally attracting less severe sanctions, were significantly less serious;

iii. Taking into account the totality of the Applicant's actions, the sanction imposed by UNICEF was in line with the practice in previous cases;

iv. UNICEF considered in mitigation, *inter alia*, the Applicant's strong and dedicated performance, his limited remorse and the lengthy investigation. Thus, he was not dismissed or separated without receiving a separation indemnity; and

d. The Applicant has failed to substantiate his claim that his due process rights were violated:

i. The Applicant was accorded due process throughout the investigation and disciplinary process;

ii. Given that UNICEF is a predominantly field-based organization, it is necessary that it sometimes utilizes professionals within an office in the field to assist with its investigations;

iii. These individuals perform tasks within boundaries and comply with the confidentiality requirements set by OIAI;

iv. The Applicant has failed to substantiate his claim that the Organization was involved in external parties becoming aware that he was under investigation; and

v. While the investigation was lengthy, it was not excessively so.

Consideration

22. The Applicant challenges the decision taken by the UNICEF to impose on him the disciplinary measure of separation from service, with termination indemnity and compensation in lieu of notice.

Standard of review in disciplinary cases

23. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal (see, e.g., *Haniya* 2010-UNAT-024, *Wishah* 2015-UNAT-537, *Ladu* 2019-UNAT-956; *Nyawa* 2020-UNAT-1024). The general standard of judicial review requires the Dispute Tribunal to ascertain:

- a. Whether the facts on which the disciplinary measure was based have been established;
- b. Whether the established facts legally amount to misconduct;
- c. Whether the disciplinary measure applied was proportionate to the offence; and
- d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

24. The Tribunal will address below these issues in turn.

Whether the facts on which the disciplinary measure was based have been established

25. The disciplinary measure in the present case is separation from service, with termination indemnity and with compensation in lieu of notice. It is well-settled that

when the disciplinary process results in separation from service, the alleged misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, e.g., *Molari* 2011-UNAT-164, *Ibrahim* 2017-UNAT-776).

26. In the present case, the facts on which the disciplinary measure is based are twofold:

- a. Count One: The Applicant's failure to disclose a conflict of interest; and
- b. Count Two: The Applicant's alleged claim of a spouse dependency allowance to which he was not entitled.

The Applicant's failure to disclose conflict of interest

27. With respect to Count One, the Tribunal finds that there is clear and convincing evidence that the Applicant did not disclose his spouse's and his father-in-law's involvement with two UNICEF implementing partners, of which the Applicant was the responsible Programme Manager on behalf of UNICEF.

28. The Tribunal highlights that, in his application, the Applicant does not dispute this fact either.

The Applicant's alleged claim of a spouse dependency allowance to which he was not entitled

29. Turning to Count Two, the Tribunal is convinced that the Applicant received a spouse dependency allowance to which he was not entitled to. The evidence on record shows that his spouse's annual gross earnings in the calendar years of 2016, 2017 and 2018 exceeded the lowest entry level of the GS staff gross salary scale in force on 1 January of the year concerned for the closest duty station in the country of the spouse's place of work, i.e. Nepal. He was thus not entitled to a spouse dependency allowance during these years under para. 1(b) of CF/AI/2000-025 (Dependency Allowances – Dependent spouse) and para. 15.1 of DHR/PROCEDURE/2017/001 (UNICEF Procedure on dependency allowances). However, the Applicant received a spouse dependency allowance in 2016, 2017, and 2018, which he did not dispute in his application.

30. Moreover, the Applicant does not dispute that he did not inform UNICEF that his spouse's earnings exceeded relevant income threshold in the year 2016, 2017 and 2018, but rather alleges that the total employment gains of his spouse did not exceed the total salary gain of the entry-level GS staff in Nepal during the period of 2013 to 2018. The Tribunal finds that this allegation is without merit. Indeed, in accordance with para. 1(b) of CF/AI/2000-025 and para. 15.1 of DHR/PROCEDURE/2017/001, entitlement to a spouse dependency allowance is based on the dependent spouse's earnings for the specific year of claim, not the cumulative earnings for different periods, i.e., 2013 to 2018 when the Applicant was paid spouse dependency allowance.

31. In addition, the Tribunal observes that during the CMD and in his closing submission, the Applicant raised a new argument: that he had never claimed the spouse allowance. To support this argument, the Applicant provided the evidence of a UNICEF "Status Report and Request for Payment of Dependency Benefits Form" dated 15 August 2013 and signed by himself only, showing that he did not wish to claim a spouse dependency benefit.

32. Even assuming that the new argument is admissible, the Tribunal is not persuaded by it. The Tribunal fails to see how a Status Report and Request Form signed in 2013, even if it is authentic, could be used to prove that the Applicant did not claim the spouse dependency allowance for the years of 2016, 2017 and 2018. In particular, the dependency allowance is determined on an annual basis based on the information provided by the staff member concerned. It is the staff member's responsibility to attest that he/she meets the eligibility and conditions for payment annually, including correctness of the information provided in his/her application for dependency allowance (see, e.g., DHR/PROCEDURE/2017/001, para. 7).

33. The Tribunal further recalls that it is undisputed that payment of dependency allowances is not automatic and that staff members must claim for payment of allowances to which they may be entitled. Therefore, the Tribunal is satisfied that there is clear and convincing evidence that the Applicant claimed spouse dependency allowance that he was not entitled to because his spouse earned more than the stipulated salary threshold in 2016, 2017 and 2018.

34. Accordingly, the Tribunal concludes that the facts on which the disciplinary measure at issue was based have been established by clear and convincing evidence.

Whether the established facts legally amount to misconduct

35. Regarding whether the established facts legally amount to misconduct, the Tribunal recalls that staff rule 10.1(a) provides that:

Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

36. The UNICEF Executive Directive CF/EXD/2012-005 (Disciplinary Process and Measures), dated 30 November 2012, in force at the time, provides in its relevant part that:

1.4 Misconduct includes but is not limited to:

(a) acts or omissions in conflict with the general obligations of staff members set forth in Article I of the UN Staff Regulations and Chapter I of the UN Staff Rules, and administrative instructions implementing it;

...

(d) misrepresentation, forgery, or false certification in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit;

...

(g) failure to disclose an interest or relationship with a third party who might benefit from a decision in which the staff member takes part or which the staff member could influence; favouritism in the award of a contract to a third party;

...

(m) breach of the Standards of Conduct for the International Civil Service.

Conflict of interest

37. Count One concerns the Applicant's failure to disclose his spouse's and his father-in-law's involvement with two UNICEF implementing partners, of which the Applicant was the responsible Programme Manager on behalf of UNICEF.

38. Staff Regulations and Rules set forth rules governing conflict of interest. In particular, staff regulation 1.2(m) provides that:

A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

39. Staff rule 1.2(q) provides that:

A staff member whose personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant shall disclose any such actual or possible interest to the head of office and, except as otherwise authorized by the Secretary-General, formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to a conflict of interest situation.

40. The Standards of Conduct for the International Civil Service also state in their relevant part that:

23. Conflicts of interest may occur when an international civil servant's personal interests interfere with the performance of his/her official duties or call into question the qualities of integrity, independence and impartiality required the status of an international civil servant. Conflicts of interest include circumstances in which international civil servants, directly or indirectly, may benefit improperly, or allow a third party to benefit improperly, from their association with their organization. Conflicts of interest can arise from an international civil servant's personal or familial dealings with third parties, individuals, beneficiaries, or other institutions. If a conflict of interest or possible conflict of interest does arise, the conflict shall be disclosed, addressed and resolved in the best interest of the organization. Questions entailing a conflict of interest can be very sensitive and need to be treated with care.

41. In the present case, the Applicant was the Programme Manager and Certifying Officer of UNICEF's PCA with Lifeline Nepal and Golden Community, both of which received substantial funding from UNICEF. Lifeline Nepal paid the Applicant's spouse approximately USD21,000 as a Consultant for a UNICEF sponsored programme that the Applicant managed. As Programme Manager, the Applicant engaged professionally with his spouse, who acted as a Board Member of Golden Community, and with his father-in-law in his capacity as Managing Director of Golden Community. Notably, on 8 December 2017, the Applicant's spouse represented Golden Community at a workshop that the Applicant attended on behalf of UNICEF. On 24 September 2018, the Applicant's father-in-law addressed a request for a no-cost extension of the PCA with Golden Community to the Applicant.

42. Given the substantial amount of money the Applicant's spouse received as a consultant for a UNICEF-sponsored programme, she directly benefitted from her engagement with Lifeline Nepal. It was, therefore, clearly in her interest that Lifeline Nepal continued to be paid by UNICEF. It was also in the interest of the Applicant's father-in-law and the Applicant's spouse that Golden Community was contracted and paid by UNICEF as an implementing partner. The Tribunal considers that the Applicant's allegation that his father-in-law did not gain any

financial benefit from the partnership agreement has no merit. Indeed, proof of personal gain or financial benefit is not a requisite element to establishing whether a staff member engaged in conflict of interest (see, e.g., *Ganbold* 2019-UNAT-976, paras. 32-34). Therefore, the Applicant's personal interests directly interfered with his role as the person in charge of managing the implementing partners on behalf of UNICEF.

43. Accordingly, the Tribunal finds that the Applicant engaged in conflict of interest in the present case. As a staff member, he was thus obliged to disclose his conflict of interest under staff regulation 1.2(m), staff rule 1.2(q) and para. 23 of the Standards of Conduct for the International Civil Service. However, the Applicant failed to do so and did not formally excuse himself from any involvement in that matter, which might give rise to a conflict of interest situation.

44. The Tribunal is not convinced by the Applicant's allegation that his failure to disclose the conflict of interest was a *bona fide* act of omission because he had not completed the mandatory course on Ethics and Fraud awareness. Notably, conflict of interest and the obligation to disclose it have been clearly outlined in the Standards of Conduct for the International Civil Service, the Staff Regulations and Rules, as well as in administrative issuances within UNICEF. It is well-settled that staff members are presumed to know the Regulations and Rules applicable to them and that ignorance of the law cannot be invoked as an excuse to justify the failure to comply with them (see, e.g., *Vukasović* 2016-UNAT-699, para. 14; *Kissila* 2014-UNAT-470, para. 24). Furthermore, it is the Applicant's responsibility to complete all mandatory courses including the mandatory course on Ethics and Fraud awareness.

45. Moreover, the Tribunal considers that the Applicant's disclosure of conflict of interest regarding his spouse's and father-in-law's involvement with two UNICEF implementing partners at the early stage of the investigation does not remedy his failure to comply with his obligation to disclose conflict of interest. Notably, staff regulation 1.2(m) explicitly requires a staff member to disclose (possible) conflict of interest when it arises. Admission of conflict of interest during

the investigation proceedings thus does not bring a violation of obligation to disclose conflict of interest into compliance.

46. Accordingly, the Tribunal finds that the Applicant's failure to disclose his conflict of interest regarding his spouse's and father-in-law's involvement with two UNICEF implementing partners is in violation of staff regulation 1.2(m), staff rule 1.2(q) and para. 23 of the Standards of Conduct for the International Civil Service, and thus amounts to misconduct pursuant to staff rule 10.1(a) and para.1.4 of CF/EXD/2012-005.

Unlawful receipt of spouse dependency allowance

47. Count Two concerns the Applicant's unlawful receipt of spouse dependency allowance for the period from 2016 to 2018.

48. In this respect, the Applicant does not dispute that he did not inform UNICEF that his spouse's earnings exceeded the relevant income threshold in the years 2016, 2017 and 2018. The Tribunal considers that such failure shows an inherent lack of integrity in violation of staff regulation 1.2(b). Further, under para. 7 of DHR/PROCEDURE/2017/01, the staff member is obliged to attest that he/she meets the eligibility and conditions for payment, including correctness of the information provided in his/her application for a dependency allowance. The Applicant's failure to inform UNICEF that his spouse's earnings exceeded the relevant income threshold in the years 2017 and 2018 is thus in violation of para. 7 of DHR/PROCEDURE/2017/01.

49. Moreover, under para. 1.4(d) of CF/EXD/2012-005, misrepresentation, forgery, or false certification in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit, amounts to misconduct. Therefore, the Applicant's unlawful receipt of spouse dependency allowance in the period of 2016 to 2018 amounts to misconduct pursuant to staff rule 10.1(a) and para. 1.4 of CF/EXD/2012-005.

50. In light of the foregoing, the Tribunals finds that the Applicant's actions in relation to both conflict of interest and spouse dependency allowance amount to misconduct under staff rule 10.1(a) and para. 1.4 of CF/EXD/2012-005.

Whether the disciplinary measure applied was proportionate to the offence

51. Staff rule 10.3(b) provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. This legal provision is mandatory since the text contains the expression “shall”. The Tribunal must therefore verify whether the staff member's right to a proportionate sanction was respected and whether the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

52. However, the Tribunal is mindful that the matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behaviour of the staff member involved. The Tribunal should not interfere with this administrative discretion unless “the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” (see *Nyawa* 2020-UNAT-1024, para. 89; see also *Portillo Moya* 2015-UNAT-523, paras. 19-21).

53. Nevertheless, due deference does not entail uncritical acquiescence (*Samandarov* 2018-UNAT-859, para. 24). The Appeals Tribunal held that misconduct “must be viewed in terms of the nature of the mission, purpose and principles of the United Nations, and the impact [that the] type of misconduct can have on the Organization's reputation, credibility and integrity” (see *Ogorodnikov* 2015-UNAT-549, para. 32).

Whether the Administration duly considered the totality of the circumstances of the case

54. In the present case, the Tribunal must determine whether the Administration's imposition of separation from service with compensation in lieu of notice and with

termination indemnities was after giving due consideration to the entire circumstances of the case.

55. UNICEF imposed the sanction on two counts:

a. Count One: The Applicant failed to disclose a serious conflict of interest involving his spouse and father-in-law; and

b. Count Two: He claimed a spouse allowance whilst his spouse earned more than the stipulated salary threshold in the period of 2016 to 2018.

56. Given the donors' funds involved, the selection of implementing partners and the administration of UNICEF's relationship with them should be free from nepotism and other forms of bias. The Applicant, who was tasked to ensure the integrity of the selection process, failed to disclose his conflict of interest regarding his spouse's and his father-in-law's involvement with two UNICEF implementing partners, which is in direct violation of staff regulation 1.2(m), staff rule 1.2(q) and para. 23 of the Standards of Conduct for the International Civil Service.

57. The Applicant's failure to inform UNICEF that his spouse's earnings exceeded relevant income threshold in the years 2016, 2017 and 2018, and thus benefiting from an allowance to which he was not entitled, also displays a serious lack of integrity. Under para. 11 of DHR/PROCEDURE/2017/01, failure to report changes or falsification of the information provided in relation to dependency allowances may result in, *inter alia*, recovery of dependency allowances previously paid by the Organization; and/or any other administrative and/or disciplinary measures in accordance with staff rule 10.2, including dismissal for misconduct.

58. Moreover, the evidence on record shows that in determining the appropriate sanction to impose, UNICEF took into account the fact that its reputation was harmed by the Applicant's misconduct, as government officials discussed his spouse's involvement with Lifeline Nepal. As mitigating factors, UNICEF considered, *inter alia*, the Applicant's strong and dedicated performance, his limited remorse and the lengthy investigation that lasted for over a period of one year whilst the Applicant was placed on administrative leave without pay. The

Applicant was thus not separated without receiving a termination indemnity, a harsher measure than the one that was ultimately imposed.

59. The Applicant contested that the DED did not take into account, *inter alia*:

- a. That he was never investigated prior to the incident under appeal; and
- b. That he never sought any personal gain or to create prejudice to the organization.

60. However, such behaviours constitute a minimum level of compliance with staff rules and regulations that do not in themselves constitute a mitigating factor. Moreover, the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (see *Nyawa* 2020-UNAT-1024; *Ladu* 2019-UNAT-956).

61. Therefore, the Tribunal finds that in determining the appropriate sanction, the Administration duly considered the nature and gravity of the Applicant's misconduct as well as all the aggravating and mitigating factors. Accordingly, the Administration's imposition of the sanction was after giving due consideration to the totality of the circumstances of the case.

Whether the sanction applied is consistent with those applied in similar cases

62. It is well-settled that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offences, the penalty, in general, should be comparable (see *Sow* UNDT/2011/086, para. 58; see also *Baidya* UNDT/2014/106, para. 66; *Applicant* UNDT/2017/039, para. 126).

63. The Tribunal is not convinced by the Applicant's allegation that the sanction applied in the present case is inconsistent with those applied in similar cases. Indeed, the circumstances of the cases cited by the Applicant are not comparable to his case. In *Baidya*, the applicant was sanctioned with a written censure plus a fine of one month's net base salary for failing to disclose the nature of his relationship with a candidate for employment (see *Baidya* UNDT/2014/106). In *Vedel*, the

applicant was sanctioned with the loss of two steps within grade for failing to formally disclose a potential conflict of interest. In that case, there was informal disclosure by the staff member, i.e., her husband's employment in the transportation business with UNICEF vendors was informally known among her colleagues (see *Vedel* UNDT/2019/110). In his closing submission, the Applicant referenced three cases concerning unauthorized outside activities which normally attract less severe sanctions.

64. However, in the present case, the Applicant not only failed to disclose a serious conflict of interest concerning his spouse's and his father-in-law's involvement with two UNICEF implementing partners, of which he was the responsible Programme Manager on behalf of UNICEF, but also failed to inform UNICEF that his spouse's earnings exceeded the relevant income threshold, resulting in his receipt of dependency allowance for 2016, 2017 and 2018, to which he was not entitled.

65. Notably, the Appeals Tribunal has confirmed that separation from service is not excessive, abusive, discriminatory or absurd in cases relating to a serious conflict of interest (see *Ganbold* 2019-UNAT-976, para. 59). Further, failure to inform changes or falsification of the information in relation to dependency allowances may, on its own, result in dismissal for misconduct pursuant to para. 11 of DHR/PROCEDURE/2017/01. The Tribunal therefore finds that the decision to separate the Applicant from service with compensation in lieu of notice and with termination indemnity cannot be regarded as excessive, abusive, discriminatory or absurd.

66. Accordingly, the Tribunal finds that the disciplinary measure applied is proportionate to the offence in the present case and that there is no basis to interfere with the Administration's exercise of discretion in this matter.

Whether the staff member's due process rights have been respected

67. Regarding the right to due process during the investigation and disciplinary proceedings, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful (see, e.g., *Abu Osba* 2020-UNAT-1061, para. 66; *Muindi* 2017-UNAT-782).

68. Staff rule 10.3, setting forth rules governing due process in the disciplinary process, provides in its relevant part that:

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and had been given the opportunity to respond to those formal allegations;

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct;

69. The Tribunal is satisfied that the key elements of the Applicant's right to due process were met in the present case. The Applicant was fully informed of the charges against him, was given the opportunity to respond to those allegations, and was informed of the right to seek the assistance of counsel in his defence. Moreover, contrary to the Applicant's assertion, the Tribunal finds that the disciplinary measure imposed on him is proportionate to the nature and gravity of his misconduct and is consistent with those applied in similar cases.

70. Turning to other alleged procedural irregularities, the Tribunal recalls that the onus is on the Applicant to provide proof of the lack of due process and how it negatively impacted the investigation and/or the disciplinary process (see *Pappachan* UNDT/2019/118 Corr.1, para 78).

71. However, other than making the allegations, the Applicant has not provided evidence that the Organization failed to take reasonable measures to protect the confidentiality of individuals who are under investigation. He also failed to substantiate how utilizing professionals within the UNICEF Country Office to

assist with the investigations negatively impacted the investigation and/or the disciplinary process, considering also that the Applicant does not dispute core facts in the present case.

72. The evidence on record shows that the investigation lasted around 14 months from 10 October 2018, when the Applicant was notified, to 16 December 2019 when the investigation report was transmitted to UNICEF. Although the Tribunal agrees with the Applicant that the investigation was lengthy, he has not demonstrated that this is a procedural error that negatively affected the outcome of the case. Further, UNICEF considered the protracted investigation as a mitigating factor in determining the sanction imposed.

73. Moreover, the Tribunal finds that the alleged procedural irregularities are of no consequence given the kind and amount of evidence proving the Applicant's misconduct. As the Appeals Tribunal stated in *Michaud*:

This is also one of those cases where the so-called “no difference” principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct (see *Michaud* 2017-UNAT-761, para. 60).

74. Accordingly, the Tribunal finds that the Applicant has failed to substantiate his claim that his right to due process during the investigation and disciplinary proceedings were violated.

75. In light of the above, the Tribunal upholds the disciplinary measure imposed on the Applicant.

Remedies

76. In his application, the Applicant seeks rescission of the decision and requests compensation. He further seeks moral damages for a molar injury during the protracted investigation and requests compensation for professional and personal reputational damage on grounds of delay in investigation.

77. Having upheld the disciplinary measure, the Tribunal rejects the Applicant's claim for compensation.

78. In relation to the alleged moral damages, the Tribunal recalls that art. 10.5(b) of its Statute, as amended by General Assembly resolution 69/203 adopted on 18 December 2014, provides that compensation for harm may only be awarded where supported by evidence. Furthermore, the case law requires that "the harm be shown to be directly caused by the administrative decision in question" (see *Kebede* 2018- UNAT-874, para. 20; see also *Ashour* 2019-UNAT-899, para. 31).

79. The Tribunal finds that other than making the allegations, the Applicant has not provided any evidence supporting that he suffered a molar injury. He also failed to show that the molar injury was directly caused by the protracted investigation.

80. Moreover, the Applicant has not demonstrated how the delay in investigating supports his claim for compensation for the alleged professional and personal reputational damage. He has not established a causal link between the delay and the impact on his professional and personal reputation. In fact, the alleged professional and personal reputational damages were caused directly by the Applicant's misconduct itself instead of the investigation.

81. The Applicant asserts that the delay in the investigation resulted in him losing two job offers. This assertion is speculative at best. First, an invitation to apply to a vacancy does not amount to a job offer. Second, all recruitment exercises entail a candidate's background verification, which includes inquiring about either having been the subject of a disciplinary process and/or the imposition of any disciplinary measure. A positive answer to these questions, which the Applicant would have had

to answer in the affirmative at the time of his job applications, would have likely impacted the Applicant's chances for selection.

82. Accordingly, the Applicant's request for the award of a compensation for moral damage is denied.

Conclusion

83. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 2nd day of November 2021

Entered in the Register on this 2nd day of November 2021

(Signed)

René M. Vargas M., Registrar, Geneva